Court forces company to execute CFIUS NSA; may affect M&A deals

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A merger in the 3D printing industry has created an interesting CFIUS dynamic: The Delaware Chancery Court has ordered Nano Dimension to complete its acquisition of Desktop Metal, ostensibly forcing them to accept a CFIUS national security agreement and close the deal ASAP. Experts say the decision will have an impact on how transaction parties approach deals.

WHAT HAPPENED

In a final judgment issued last week, the Delaware Court of Chancery ordered Nano Dimension to accept the terms of a CFIUS mitigation agreement and complete its acquisition of Desktop Metal. "Nano must agree to and execute a National Security Agreement in a form proposed by the Committee of Foreign Intelligence in the United States," wrote the court.

Judge Kathaleen Saint Jude McCormick, chancellor of the Delaware Court of Chancery, signed the order and partial final judgement regarding Nano Dimension and Desktop Metal. The ruling requires Nano to accept the terms of a CFIUS NSA and complete the merger.

The decision came after Desktop Metal, a Massachusetts-based 3D printing company, took legal action against Nano Dimension, alleging that the company breached its legal obligation to get regulatory approval for the merger as soon as practicable.

Nano Dimension, based in Israel, had announced back in July of 2024 that it would acquire Desktop Metal for approximately $135 million. As we covered in our CFIUS tracking spreadsheet, Desktop Metal's shareholders approved the deal in October, but by December there was already a lawsuit alleging that Nano Dimension "breached its obligation to use reasonable best efforts" to obtain regulatory approval for the merger.

According to the 112-page full opinion from the court, the parties had actually expected all along that CFIUS approval would be complicated, and would likely require a NSA. Since Desktop was concerned about having enough cash to get through the CFIUS process, the company negotiated for a "hell or high water" provision, which required Nano to "take all actions necessary to obtain CFIUS approval" and do it quickly. That process was delayed

by an activist investor at Nano, who wanted to unwind the deal and then buy Desktop out of bankruptcy.

In the court's order and final judgement, the Delaware Court of Chancery sided with Desktop Metal, stating that Nano "materially breached" the agreement. Noting that the merger remains in "full force and effect," Nano is prevented from raising any conditions to closing, and "must agree to and execute a National Security Agreement in a form proposed by the Committee of Foreign Intelligence in the United States."

FIRST CASE?

While there is actually a more complicated backstory around this merger (involving the activist shareholder and another company called Stratasys), we'll avoid a deep dive and focus instead on the implications of a court-ordered execution of a CFIUS mitigation agreement.

First, it's worth noting that several CFIUS experts told Foreign Investment Watch that they weren't aware of similar court-mandated NSAs before. "I am not aware of any cases in which a court has ordered the acceptance of CFIUS mitigation in order to close a transaction," said Clifford Chance partner Renée Latour.

Clifford Chance partner Renée Latour says that for transactions ripe for CFIUS mitigation, parties should not rely on stock or boilerplate CFIUS agreement language. "Simply put, parties should tailor the language to reflect the specifics of the potential mitigation and what will or will not be acceptable."

Stephanie Douglas, president of the National Security group at Guidepost Solutions, agrees. "I am unaware of any similar cases or for making a company agree to a drafted NSA as part of penalty."

"The Chancery Court decision is certainly unique in that it is one of the few times that we've seen the judiciary intervene in or direct a CFIUS-related outcome," said DLA Piper partner Christina Daya.

Torres Trade Law managing member Olga Torres also said she couldn't recall similar incidents, but that these cases "are not unheard of."

For example, Baker McKenzie partner Rod Hunter points to a 2017 case involving Ness Technologies and Chinese conglomerate HNA Group. That case argued that one of the parties, among other things, "willfully and materially breached the agreement by taking actions that prevented, delayed and impeded CFIUS approval."

Either way, Torres says the case "will be an important precedent for future deals, especially as it relates to the interpretation of 'reasonable best efforts' to obtain CFIUS approval."

Daya at DLA Piper says that the requirement to use "reasonable best efforts" to obtain regulatory approval in connection with a merger or acquisition is relatively standard. However, she adds, "the fact that the court agreed with Desktop Metal's argument that Nano Dimension had materially breached this obligation suggests that we can expect transaction parties to be more specific about what such efforts may, or may not,

entail in a transaction document to avoid the ambiguity that typically surrounds this concept."

Others agree. "Parties are required to *actively pursue* all conditions for closing," said one member the CFIUS bar who previously served in roles at the Departments of Defense and Homeland Security. "The court is reminding all parties that best-faith effort around regulatory approval isn't just something on a checklist, but is a condition that also must be *actively* pursued."

FUTURE IMPACT

Latour at Clifford Chance says that the case "really highlights the importance of thoroughly assessing the specific risks and potential CFIUS mitigation measures for the deal early in the transaction process, and more importantly, using that information to craft CFIUS provisions specific to the transaction." In other words, says Latour, "in a transaction ripe for CFIUS mitigation, do not rely on stock or boilerplate CFIUS agreement language." In this case, says Latour, the parties had negotiated to accept mitigation, and that proved critical when CFIUS required a NSA. "Simply put," she says, "parties should tailor the language to reflect the specifics of the potential mitigation and what will or will not be acceptable."

Olga Torres of firm Torres Trade Law says transaction parties should be aware that "it is possible to be contractually obligated to agree to certain terms after a CFIUS review that may alter the acquiring party's rights and access in a way that may not be as favorable as was originally contemplated."

"One apparent lesson is that parties should pre-determine what would be acceptable" should a mitigation agreement be imposed by the government, says one member of the CFIUS bar. "What would be too onerous or expensive from a compliance or strategic perspective? Transaction parties should understand those bright lines up front, and should make accommodations in documentation and disclosures, should another Nano-type situation arise."

Torres of Torres Trade Law says this is critical, and notes that future transaction parties "should be aware that it is possible to be contractually obligated to agree to certain terms after a CFIUS review that may alter the acquiring party's rights and access in a way that may not be as favorable as was originally contemplated."

Nova Daly at Wiley agrees, noting that companies need to plan well in advance. "The court decision is fairly precedent setting, and reaffirms the need for deal firms to bring in CFIUS counsel early when constructing the deal terms," he says. "Too often, regulatory counsels are brought into the process too late to guard against unanticipated obligations and/or penalties that their clients could have been saved from."

Douglas at Guidepost agrees, noting companies need to be well prepared and aware of any potential CFIUS remedy. "While not all companies have the capability of assessing their own national security risk well," she says "having a good understanding of potential engagement by CFIUS is essential for smooth transactions." Douglas adds that CFIUS

negotiations take time, “and a rushed or forced negotiation can sometimes lead to an agreement that the transaction parties may not be capable of or willing to fulfill.”

To that point, experts say compliance with the Chancery Court’s decision may be challenging under the required time frames. “It will be impossible for Nano to negotiate and sign an NSA within 48 hours as ordered by the court, unless an NSA is already complete and just awaiting signature,” said one expert on National Security Agreements.

We’ll keep readers apprised developments in this case.

MORE INFORMATION

The Chancery Court’s order and partial final judgement is available, as is the full 112-page opinion.

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